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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 192.

WILLIAM SESSOMS,

Petitioner,

v.

THE UNION SAVINGS AND TRUST COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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I. THE TRIAL COURT'S SUBMISSION OF INTERROGATORY NO. 3 IN COMPLIANCE WITH RULE 49(b) AND THE JURY'S "NO" ANSWER RENDERED HARMLESS THE ERROR IN THE CHARGE.

Respondent, as did the court below, impugns the mental processes of the jury in answering fact Interrogatory No. 3. The argument that the twelve jurors may have been confused when they wrote their "No" answer to the special interrogatory, inquiring into the issue of petitioner's guilt, finds no basis in the record. It is speculation only.

This speculation rests upon unfounded assertions that the Trial Court "gave no explanation or instruction" in its handling of the interrogatory and that it "submitted Interrogatory No. 3 without any explanation or instruction." (Respondent's Brief, pp. 5-6.)

Claiming that Interrogatory No. 3 was submitted "without any explanation or instruction," respondent says

the jury was "in effect told" that its answer was "unimportant" and "made no difference," and that it could "shrug the interrogatory off." (Respondent's Brief, p. 6.) Describing this alleged omission of the Trial Court as an "erroneous presentation" of Interrogatory No. 3, respondent says the jury's answer to the interrogatory did not render harmless the error in the court's charge because "What the jury intended by its answer * * * is pure speculation and the answer cannot be relied upon * * *." (Respondent's Brief, pp. 8-9.)

Relying upon this alarmingly inaccurate version of the record, respondent conjectures: "At best, the jury could not help but be confused." (Respondent's Brief, p. 5.)

There exists no reason in this case to so discredit the jury's fulfillment of its fact finding function under Rule 49(b). The jury answered respondent's fact Interrogatory No. 3. This was a pure fact question, not the mixed issue of law and fact that the court erroneously told the jury it need not consider. The jury answered that interrogatory after full instructions from the Trial Court. Its answer distinctly negatived respondent's hypothesis of prejudicial error in the Trial Court's charge.

Literal obedience to Rule 49(b) was paid by the Trial Court when it submitted respondent's interrogatories. The jury was told to consider each interrogatory. It was told to answer each interrogatory. It was told that each juror must indicate by his signature that the answer to the interrogatory was *his answer*. The Trial Court's instruction was direct; it was understandable. Its exact words were:

> "Now, there have been submited to me *special interrogatories,* which is a part of the practice in this Court, which are to be submitted to the jury by the Court *and which the jury is to answer.*

"There are three interrogatories or questions, *and these interrogatories are to be considered by you and an answer given by you in which, of course, all of you must agree.* Your foreman, of course, can answer each of the three on the blank provided for answers, but in addition to that there is another space which provides that *all the jurors will sign that the answers as given* by the foreman's signature *are the answers of all twelve of the jurors,* and you indicate that by signing it.

"I don't think it will prove very difficult for you to understand the procedure. So *this will be submitted to you for your consideration with all the other evidence.*" (Joint Appendix, p. 434a. Emphasis ours.)

Respondent and the Court of Appeals would scuttle the fact finding performed by the jury in response to precise directions by the Trial Court. Respondent seeks this result by depicting the twelve jurors as "confused and misled." (Respondent's Brief, p. 8.) But the jury understood that each interrogatory was important; it understood that each interrogatory had to be considered and then answered. This is demonstrated by the colloquy between the Trial Court and the jury's foreman:

"The Court: Then I told you, *as to the interrogatories,* that your foreman could execute the answers on the pages of the interrogatories, but on the fourth page *all the jurors must agree to the answers given by the foreman.* Is that clear? In other words, this must be unanimous."

"The Foreman: Is that a yes or no answer? The way these questions are worded we can answer yes or no.

"The Court: Can't you answer them that way?

"The Foreman: Maybe we can, but that's what we want to find out.

"The Court: I thought they were written that way.

"The Foreman: Yes, they can be answered yes or no, but *I wanted to know whether you wanted us to answer them and give our reasons.*

"The Court: *No, no reasons at all. The foreman can execute the answer of all of you to the three questions* on each of those three pages, *and then* on the fourth page *all of you signify your agreement, if you do agree to what the foreman has written on the three pages. So that your signatures are on the final agreement to show that you all agree with the foreman's answers. That's the purpose of it.* (Joint Appendix, p. 435a.)

"The Foreman: We are clear on that part, your Honor, * * *." (Joint Appendix, p. 436a. Emphasis ours.)

At trial respondent accepted the court's instruction to each juror that he direct his attention to the interrogatories and answer each one of them. Respondent did not then complain that the Trial Court's presentation of Interrogatory No. 3 was "erroneous" or "confused" the jury. It did not so complain because the Trial Court's instructions made clear, to lawyer and layman alike, that Interrogatory No. 3, a direct inquiry into the issue of petitioner's guilt, *did have to be considered and did have to be answered.*

Disappointed with the jury's "No" answer on the question of petitioner's guilt, respondent on appeal argues the answer "made no difference" and was "surplusage." This is to argue that a jury's Rule 49(b) response to a fact interrogatory, after instruction by the Trial Court, is an exercise in futility.

Under the doctrine laid down in *Kanawha and Michigan Railway Co. v. Kerse, Adm.* (1915), 239 U. S. 576, the answer of the jury to respondent's Interrogatory No. 3 distinctly negatived the fact that makes up respond-

ent's hypothesis of an erroneous charge in this case. The jury's special finding showed that the Trial Court's erroneous charge caused no injury. It was harmless.

II. RESPONDENT FAILED TO OBJECT TO THE ERRONEOUS CHARGE UPON WHICH IT PREDICATES REVERSIBLE ERROR ON APPEAL.

Respondent states as a fact, at page 2 of its brief, that it excepted to the charge of the Trial Court. That is not correct. Respondent did not except and the Court of Appeals conceded respondent did not except. (Appendix, p. 27.)

The Trial Court gave respondent opportunity to object to its charge:

> "That is all I intended to say to the jury. Is there any matter that I have omitted, or that you want corrected? (p. 434a, Joint Appendix.)"

Respondent was silent. It did not object.

Respondent asserts that its exception to the court's refusal to give its requested charge (the last sentence of which was so badly drafted as to amount virtually to a directed verdict) "obviated the necessity of a further exception to the related erroneous statement in the general charge * * *." (Respondent's brief, p. 2.) But it cites no authority for this assertion.

To the contrary, Rule 51 of the Federal Rules provides:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In violation of this rule the reversal below sanctions review of a charge that, when given, manifestly satisfied the party that now complains of it on appeal.

CONCLUSION.

Respondent assigns as error a charge to which it did not except, and the Court of Appeals reverses on the ground of that error. Both so violate Federal Rules of Civil Procedure Rule 51.

The Trial Court's error was made harmless by the jury's answer to a special interrogatory. The interrogatory was clear. The jury was plainly told it must answer it, and did so. It answered that petitioner William Sessoms did not cash the check twice. This proves him not guilty and makes harmless the court's erroneous instruction that the jury need not consider whether he was guilty or not. To hold that the unexcepted-to error vitiated the answer to the interrogatory by confusing the jury violates Rule 51 again, and also violates Rule 49(b).

The petition for certiorari should be granted to protect the vitality of Rules 51 and 49(b), and of jury verdicts.

Respectfully submitted,

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